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<b>R.W., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 17-0720</b>
	)	<b>Issued: May 21, 2018</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS HEALTH ADMINISTRATION,</b>	)	
<b>WEST LOS ANGELES VETERANS</b>	)	
<b>ADMINISTRATION MEDICAL CENTER,</b>	)	
<b>Los Angeles, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 13, 2017 appellant, through counsel, filed a timely appeal from a December 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant met her burden of proof to establish a recurrence of disability commencing October 15, 2015 causally related to the accepted September 14, 2015 employment injury.

## **FACTUAL HISTORY**

On September 18, 2015 appellant, then a 47-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2015 her right foot and ankle were struck by an electric cart while in the performance of duty. She stopped work on September 16, 2015. On September 22, 2015 Dr. David Webb, a critical care specialist, noted that her right ankle strain had resolved. Appellant returned to full-duty work on September 22, 2015.

OWCP accepted that appellant sustained a right ankle ligament sprain and a contusion of her foot and ankle as a result of the September 14, 2015 employment incident. The record substantiates that as of October 12, 2015 appellant's claim was accepted for medical treatment.

On December 9, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of disability due to her September 14, 2015 work injury on October 14, 2015. She related that she stopped work on October 15, 2015. Appellant explained that she thought that she would be able to perform her work duties when she returned to work, but she was unable to do so. She also noted that she was using crutches and that her left knee had given out.

Appellant filed several claims for compensation (Form CA-7) claiming compensation for time lost from work beginning November 18, 2015.

In a January 4, 2015 development letter, OWCP informed appellant that the evidence of record was insufficient to support her recurrence claim. Appellant was advised of the medical and factual evidence needed and was afforded 30 days to submit the necessary evidence.

Medical evidence from Dr. William C. Kim, a Board-certified orthopedic surgeon, was received. In a November 11, 2015 report, he noted his examination findings and diagnosed contusion strain, right lateral ankle, with strain of the calf. Dr. Kim recommended a right calf and ankle magnetic resonance imaging (MRI) scan. He opined that due to painful guarding of her ankle, appellant had aggravated her previous left knee condition. Dr. Kim held her off work until December 16, 2015 for right lower extremity pain. In a November 11, 2015 attending physician's report (Form CA-20), he indicated that he first examined appellant on November 11, 2015. Dr. Kim advised that she was totally disabled for the period October 15 through December 16, 2015.

In a December 15, 2015 treatment note, Dr. Kim opined that appellant had right foot plantar pain consistent with plantar fasciitis, for which he recommended stretching. He indicated that the ankle MRI scan demonstrated osteochondral defect in the talus, for which he recommended a podiatry consultation. Dr. Kim held appellant off work for six weeks.

In a January 26, 2016 treatment note and attending physician's report, Dr. Kim diagnosed contusion strain right ankle. He noted that appellant had an osteochondral defect and referred her to podiatry. Dr. Kim continued to hold her off work due to increased pain.

By decision dated February 5, 2016, OWCP denied appellant's recurrence of disability claim as of October 15, 2015 because the medical evidence of record failed to establish disability due to a material change/worsening of her accepted work-related conditions. It noted that she did not answer the questions in the questionnaire regarding the recurrence. OWCP also noted that the medical reports from Dr. Kim held no weight, as he was not her authorized physician. It noted that appellant was advised in its October 30, 2015 acceptance letter that the medical reports of Dr. Webb had established that the accepted right ankle condition had resolved and that the claim was considered closed at the time of acceptance.

On February 24, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on October 13, 2016. Appellant testified that she had to return to regular-duty work as the employing establishment did not have work available within the restrictions recommended by her physician. She further stated that she could not perform her duties and was out of work for approximately seven months. Counsel argued that appellant was out of work within weeks of her initial injury and stopped work when she was unable to perform her assigned duties.

In a January 25, 2016 claim for compensation (Form CA-7), appellant claimed wage loss for the period November 18, 2015 through January 21, 2016.

In a March 15, 2016 report, Dr. Kim recommended that appellant have a podiatry consultation regarding her right foot. He indicated that she could return to modified duties. In a November 8, 2016 report, Dr. Kim reported that appellant had decreased right calf and ankle/foot pain. Referrals to podiatry for the right foot and neurology for a lumbar condition were recommended.

By decision dated December 27, 2016, an OWCP hearing representative affirmed OWCP's February 5, 2016 decision. The hearing representative found that Dr. Kim had not provided objective findings to support a recurrence of disability commencing October 15, 2015.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> The term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *G.T.*, 59 ECAB 447 (2008).

<sup>5</sup> *See Prince E. Wallace*, 52 ECAB 357 (2001).

Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.<sup>6</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>7</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>8</sup>

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.<sup>9</sup>

OWCP's procedures require that, in cases where recurrent disability from work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as for a recurrence claimed long after apparent recovery and return to work. Therefore, in cases where recurring disability from work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship. The attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability commencing October 15, 2015 causally related to her September 14, 2015 employment injury.

OWCP accepted appellant's claim for right ankle ligament sprain and a contusion of her foot and ankle as a result of the September 14, 2015 employment incident. On September 22, 2015 Dr. Webb noted that her right ankle strain had resolved. Appellant was released to full duty without restrictions on September 22, 2015. She subsequently filed a claim for recurrence of disability commencing October 15, 2015.

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<sup>6</sup> See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

<sup>7</sup> *William A. Archer*, 55 ECAB 674 (2004).

<sup>8</sup> *S.P.*, Docket No. 16-1384 (issued February 1, 2017).

<sup>9</sup> 20 C.F.R. § 10.5(x).

<sup>10</sup> *A.C.*, Docket No. 17-0384 (issued September 11, 2017); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

The record reflects that appellant sought treatment from Dr. Kim on November 11, 2015. In a November 11, 2015 report, Dr. Kim diagnosed contusion strain, right lateral ankle, and a calf strain. He opined that appellant had aggravated her previous left knee condition due to guarding of her ankle. Dr. Kim held her off work through December 16, 2015 for right lower extremity pain, noting that the disability had started on October 15, 2015. In his December 15, 2015 treatment note, he noted that appellant had right foot plantar pain consistent with plantar fasciitis, for which he recommended stretching. Dr. Kim noted that the ankle MRI scan demonstrated osteochondral defect in the talus and recommended a podiatry consultation. He continued to hold appellant out of work due to increased pain, but released her to modified work on March 15, 2016. Dr. Kim continued to report on her right calf and ankle/foot pain.

At the time of his November 11, 2015 examination, Dr. Kim related that appellant was totally disabled from October 15, 2015, the claimed recurrence date. While he noted right lower extremity pain in his November and December 2015 treatment notes and diagnosed other conditions such as plantar fasciitis and an osteochondral defect in the talus. Dr. Kim's reports are insufficient to establish appellant's claim for recurrence of disability as he failed to provide medical rationale, explaining with objective findings, why the accepted conditions prevented her from performing her specific employment duties. As previously noted, findings on examination are necessary to support a physician's opinion that an employee is disabled from work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a sufficiently rationalized medical opinion to establish disability.

Additionally, the Board notes that OWCP had not accepted the other conditions diagnosed by Dr. Kim.<sup>11</sup> Dr. Kim has not provided any medical explanation as to how these other conditions were causally related to the accepted employment injury. Thus, his reports are insufficiently rationalized to establish appellant's claim for a recurrence.<sup>12</sup>

For each period of disability claimed, the employee must establish that she was disabled for work as a result of the accepted employment injury. Dr. Kim's reports did not establish with objective findings that appellant was disabled from working from October 15, 2015 due to work-related conditions.<sup>13</sup> Accordingly, the Board finds that she has not met her burden of proof.<sup>14</sup>

On appeal, counsel argues that "claimant should have been awarded compensation." However, as discussed above, Dr. Kim's reports are insufficient to establish that the accepted conditions prevented appellant from working commencing October 15, 2015.

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<sup>11</sup> *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (where a claimant claims that a condition not accepted or approved by OWCP was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

<sup>12</sup> *L.G.*, Docket No. 11-0142 (issued August 12, 2011).

<sup>13</sup> *R.A.*, Docket No. 14-1327 (issued October 10, 2014).

<sup>14</sup> *L.L.*, Docket No. 13-2146 (issued March 12, 2014). *See also William A. Archer* 55 ECAB 674, 679 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability commencing October 15, 2015 causally related to the accepted September 14, 2015 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board